Michael K. Jeanes, Clerk of Court
*** Filed ***
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000417-001 DT 09/19/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
H. Beal
Deputy

GREGORY LEACH

GREGORY LEACH
5612 E KELTON LN
SCOTTSDALE AZ 85254

v.

DIMITRIOS BOUKALIS (001)

DIMITRIOS BOUKALIS
8336 N 7TH ST
PHOENIX AZ 85020

MCDOWELL MOUNTAIN JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2010151863

Plaintiff Appellant Gregory Leach (Plaintiff) appeals the McDowell Mountain Justice Court's determination denying his motions to vacate judgment in Defendant's favor. Plaintiff contends the trial court erred. For the reasons stated below, the court affirms the trial court's judgment.

I. FACTUAL BACKGROUND.

Plaintiff filed a small claims complaint against Defendant on March 25, 2010, alleging Defendant has not paid his (Defendant's) HOA dues and, accordingly, placed Plaintiff in a prejudicial position.[1] The claim is signed by Plaintiff personally, and not in a representative capacity. He alleged Defendant owed him $2,500.00.

The underlying dispute appears to stem from the HOA's attempt to collect alleged past due HOA fees, past due interest, and legal fees from Plaintiff.[2] Plaintiff is a homeowner in the association. Defendant owns a majority of the homes in the association—14 out of a possible 26–either in his personal capacity or through his business entities and is on the association's Board.

[1] Neither party to this case provided this Court with an audio transcript or a written transcript. All information is taken from pleadings filed in the court file. Because most of the pleadings lack dates and page numbers, this Court will generically refer to the documents.
[2] January, 15, 2010, letter from Beth Mulcahy, re Coronado Pointe Townhomes Association.

The association's attorney—Ms. Mulcahy—sent Plaintiff a demand letter requesting payment of the allegedly past due fees, late fees, and interest. Plaintiff responded with a request for more information as he believed Defendant was not paying his fair share of the dues.

Plaintiff requested information about Ms. Mulcahy representing Defendant in his private capacity and was informed —by e-mail—Ms. Mulcahy's firm only represented the association.[3] Plaintiff filed a complaint in small claims court. Defendant then hired Ms. Mulcahy[4] who had the suit moved to justice court.[5] Defendant filed a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted that same day. In this motion Defendant alleged (1) an absence of privity of contract between Plaintiff and Defendant; (2) Defendant was current on all assessments; and (3) any obligation Defendant had to pay assessments went to the Association and not to Plaintiff

The parties disputed Defendant's status within the association. Defendant's alleged position is that he is the Declarant and, therefore, was only subject to paying 25% of the assessed dues. Plaintiff maintained[6] Defendant's corporation is the Declarant and Defendant owed the entire amount of monthly dues for the properties he owns solely and separately. Plaintiff alleged Defendant's failure to pay his proportionate share of the monthly assessments resulted in Plaintiff paying a disproportionate amount of dues.

The case is characterized by numerous pleadings, none of which were summarized or specifically referred to by either party in an appellate memorandum. In addition, Plaintiff repeatedly refers to Defense counsel—Ms. Mulcahy—and his claims about her simultaneously representing Defendant and the HOA. Defendant asserts Ms. Mulcahy breached her duty to the HOA and to him—as a member of the HOA—by agreeing to represent Defendant in this case.

The trial court dismissed this case on May 13, 2010. On June 10, 2010, the trial court granted Defendant his reasonable attorney fees. On November 12, 2010, Plaintiff filed a motion to vacate the prior judgment. Plaintiff also filed a document dated November 10, 2010, detailing his complaint and his version of the facts. At the end of this document, Plaintiff stated the following:

> In Summary, it is beneficial for the member/owners of this Association for me to withdraw my complaint against Mr. Boukalis and I hereby do so. It is also beneficial for the Association and my request that this court Quash the Judgment and Garnishee awarded Mr. Boukalis whereby a new fresh attempt to solve the Association problems can take place or Mr. Boukalis himself orders this to be Quashed [sic].

[3] E-mail from Beth Mulcahy to Greg Leach dated December 10, 2009.
[4] Letter from Beth Mulcahy to Greg Leach dated April 27, 2010; Notice of Appearance in CC2010–151863–SC dated April 14, 2010.
[5] Defendant's Request to Transfer to Civil Division in CC2010–151863–SC dated April 14, 2010.
[6] Gregory E. Leach Complaint Against the Beth Mulcahy Law Firm.

Defendant did not oppose this motion and the trial court granted it on December 8, 2010. While this motion was pending—on November 25, 2010,—counsel for Defendant moved to withdraw, claiming a conflict of interest. By later affidavit,—on December 23, 2010—Ms. Mulcahy informed the trial court she told Defendant about Plaintiff's Motion To Vacate but failed to give Defendant the due date for the responsive memorandum. Defendant then filed a Motion To Reinstate the judgment on December 28, 2010. Plaintiff opposed the Motion To Reinstate, claiming Defendant received a copy of the Motion to Vacate and Defendant's motion was not timely. On February 15, 2011, the trial court reversed its order vacating the December 8, 2010 judgment.

Plaintiff filed another Motion to Vacate Judgment on February 25, 2011, which the trial court—on March 29, 2011,—denied. Plaintiff also submitted a letter to the trial court on February 23, 2011, referring to State Bar proceedings and to his claim about Ms. Mulcahy's dual representation and conflict of interest. Plaintiff's February 25, 2011, request takes the form of a letter and primarily alleges misconduct on Ms. Mulcahy's part because (1) she represented Defendant and (2) because Plaintiff believes she misstated facts and information. Plaintiff further asserts Defendant had sufficient time to respond to Plaintiff's motion because he sent Defendant "certified notice."[7] On April 5, 2011, Plaintiff again filed a motion to vacate the judgment. Defendant again opposed this motion claiming Plaintiff had given no reason and had "multiple times to be heard." The trial court denied Plaintiff's Motion To Vacate on April 28, 2011.

The case is characterized by numerous pleadings, none of which were summarized or specifically referred to by either party in an appellate memorandum. In addition, Plaintiff repeatedly referred to Defense counsel—Ms. Mulcahy—and his claims about her simultaneously representing Defendant and the HOA in his appeal. Defendant asserted Ms. Mulcahy breached her duty to the HOA and to him—as a member of the HOA—by agreeing to represent Defendant in this case. Thus, on appeal, Plaintiff (1) reiterated his claim about Ms. Mulcahy's conflict of interest and breach of ethical duties; and (2) requested this Court strike "The Memorandum presented by the Mulcahy Law Firm." Plaintiff did not otherwise identify the memorandum he wished this Court to strike. Plaintiff also requested this Court to "vacant [sic] or quash this entire case."[8] Plaintiff also requested this Court "order that this case be turned over to the proper legally authorized government agency to review the complaint or permanently vacate it" and suggested the proper authority is "the Building, Fire, and Safety Department" because a new law will become effective on September 30, 2011.

Plaintiff filed a timely appeal on May 7, 2011. Defendant responded and requested the Court deny Plaintiff's appeal. Neither party provided this Court with a transcript of any proceedings. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

[7] Letter/Document addressed to Maricopa County Justice Court, State of Arizona, McDowell Mountain Justice Court, dated February 25, 2011, from Gregory Leach.
[8] Appellant Memorandum filed July, 1, 2011, Conclusion.

II. ISSUES:

A. Did Defendant Properly Present His Issues on Appeal.

Plaintiff requests this Court "turn over the matter [sic] to the proper legally authorized government agency" and suggests an agency that is not yet in power. This the Court cannot do. This Court is not empowered to refer cases to agencies—particularly agencies that do not yet have the power to do what Plaintiff requests. Consequently, this Court shall not refer this matter to any agency.

Additionally, this Court finds Plaintiff has submitted a narrative memorandum that neither clearly articulates any legal issue, references the record, nor cites any relevant authority. In terms of the remedy sought on appeal, Plaintiff's appellate memorandum fails to comply with Rule 8 (a) (3), Super. Ct. R. App. P.—Civil, which states:

> Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

Here, Plaintiff mentions several issues or grievances. Merely mentioning an argument is not enough. "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). This Court "is not required to assume the duties of an advocate and search voluminous records and exhibits" to substantiate a party's claims. *Adams v. Valley National Bank*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (Ct. App. 1984). Furthermore, Plaintiff includes many unrelated issues.

Plaintiff failed to cite to the record in his appeal. When a litigant fails to include citations to the record in an appellate brief, the court may disregard that party's unsupported factual narrative and draw the facts from the opposing party's properly-documented brief and the record on appeal. *Arizona D.E.S. v. Redlon*, 215 Ariz. 13, 156 P.3d 430, ¶ 2 (Ct. App. 2007). Unfortunately, Defendant also did not cite to the record.

Plaintiff has, throughout his motions and appeal, made claims of ethical violations against Ms. Mulcahy. This is not the proper forum for these claims. His appeal is—and must be— based on his complaint and the actions occurring before the trial court. This Court is not the forum for disciplining attorneys. Neither is the trial court. She is not a party to the lawsuit at issue. Consequently, if Plaintiff has a claim against Ms. Mulcahy, he needs to bring his claim in the appropriate forum; directly state the basis for any claim; and follow all procedurally mandated steps for prosecuting the claim. He cannot bootstrap his unhappiness with her actions into an appeal based on an underlying dispute over a sum certain—$2,500.00—filed against Defendant.

Plaintiff's initial claim was for $2,500.00 which he alleged Defendant owed to him. In his later pleadings, he asserted Defendant failed to properly pay Defendant's assessment to the HOA. Plaintiff never established he was authorized by the HOA to collect any allegedly past due assessment. Plaintiff also did not show he was an authorized agent for the HOA.

Fundamental error aside, allegations without specific contentions or references to the record do not warrant consideration on appeal. *State v. Cookus,* 115 Ariz. 99, 104, 563 P.2d 898, 903 (1977). Fundamental error rarely exists in civil cases. *See Monica C. v. Arizona D.E.S.,* 211 Ariz. 89, 118 P.3d 37, ¶ 23 (Ct. App. 2005) (explaining that courts apply the doctrine sparingly and that fundamental error is error going to the case's very foundation that prevents a party from receiving a fair trial). *See also Bradshaw v. State Farm Mutual Automobile Ins. Co.,* 157 Ariz. 411, 420, 758 P.2d 1313, 1322 (1988) (doctrine of fundamental error in civil cases may be limited to situations when a party was deprived of a constitutional right). Here, neither party presented any properly documented claim and this Court finds no fundamental error. No audio record was provided. Neither party provided this Court with a written transcript of any hearing. Having reviewed the trial court file, this Court finds no fundamental error in the record.

III. CONCLUSION.

Because Defendant failed to provide this Court with a properly filed appellate memorandum and because his claim appears to be a conglomerate of alleged abuses from Plaintiff as well as from a third party—Ms. Mulcahy— this Court finds Plaintiff failed to substantiate his claim or provide a legal basis for relief. Based on the foregoing, this Court concludes the McDowell Mountain Justice Court did not err.

IT IS THEREFORE ORDERED affirming the judgment of the McDowell Mountain Justice Court.

IT IS FURTHER ORDERED remanding this matter to the McDowell Mountain Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court

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